Abstract

In line with the present symposium, this essay draws on the theory of 'federalism as the new nationalism' to illustrate that also in the European Union, regulatory fragmentation is not necessarily synonymous with disintegration. Rather, it will be seen, regulatory fragmentation can be conceptualized as a tool aiding European integration. Looking towards the European Union, and more particularly at the status of subnational authorities ('SNAs') in EU law, the paper identifies decisions of the Court of Justice of the European Union in the area of free movement law that illustrate that SNAs can be conceived as valuable insiders, rather than threatening outsiders, of European law. This account, which indicates that SNAs' contribution to European legal integration is in many ways analogous to that of the Member States, stands in contrast with the European Treaties according to which only two levels of public authority matter. Primary law's portrayal considers SNAs to be a predominantly domestic phenomenon of little relevance for the supranational project. My analysis, however, underscores that subnational authorities and their norms do not exist in a sphere separate from that of EU law. It highlights diverse interactions between the subnational and the supranational and claims that the influence of levels of public authority in the contemporary EU can best be captured by their connections rather than separation. Indeed, contrary to commonplace assumptions, it is not actors' formal status, anchored in the paradigms of independence, sovereignty and autonomous competences, but rather the manifold functional interactions between them that shape their relations in the polycentric Union. By virtue of their interconnection with the supranational level, SNAs can, just as the Member States influence EU law's substantive development. Through this functional lens, the paper will confirm what federalism scholars have already identified in the US, namely that 'decentralization can serve rather than undermine the project of integration'.[1]

[1] Heather Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L. J. 1889, 1897 (2014).

Fragmentation as an Agent of Integration: Subnational Authorities in EU Law

The American account of 'federalism as the new nationalism' draws out the virtues of devolution for the cohesion of the overall system. This theory, exposed more fully in Kleinlein and Petkova's introduction, directs attention to a federalism '[s]horn of the traditional trappings of sovereignty and separate spheres, detached from the notion that state autonomy matters above all else'.[2] Importantly, for my purposes, the insights offered by these scholars include an analysis of the integrative role of subnational governance. In particular, Resnik, Gerken and Rodríguez have shown that local policies integrate rather than divide the US polity.[3] These accounts underline that the fragmentation inherent to polycentric systems can 'serve rather than undermine the project of integration'.[4]

This essay looks towards the other side of the Ocean. It offers a perspective on the decentralization arrangements that exist within the various EU Member States to highlight hat local and regional governments (referred to as 'subnational authorities' or 'SNAs'[5]) can provide constructive contributions to, rather than being a complicating factor of, European integration. While no unanimous definition of 'integration' has been identified by the 'federalism as the new nationalism' school, the process is understood as the 'knitting together' of the polity.[6] It is in this sense that I rely on the notion here, referring not only to he continued existence, but also to the harmonious coexistence of various actors in a context characterized by both independence and interdependence.[7] Pursuant to this account, SNAs' role and influence can best be captured by the relations they entertain as opposed to their formal status. In contrast to the Member States, the masters of the Treaties, EU primary law indeed allocates no formal spheres of autonomy and regulatory competence to local and regional authorities. The Treaties picture the EU as a bi-centric structure in which the competences of the Union and the States are clearly defined.[8] They, however, provide no comprehensive engagement with SNAs[9], leading to the assumption that they, as well as their norms, are of little relevance for European integration.[10]

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[2] *Id*. at.1889.

[3] This is explicit in the Tenth Amendment to the U.S. Constitution.

[4] Gerken, *supra* note 1 at 1897.

[5] Local and regional authorities of course have wildly diverging denominations and competences under domestic law. For the sake of simplicity, this essay refers to them generically as 'SNAs'.

[6] Gerken, *supra* note 1 at 1897.

[7] These parts nonetheless continue to remain separate as their independent production of norms highlights

[8] Consolidated Version of the Treaty on European Union [2010] OJ C 83/01 (hereinafter TEU) and Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C 115/47 (hereinafter TFEU).

[9] The Treaties do refer to SNAs in Articles 4(2) TEU and 5(3) TEU. This does not, however, negate the conclusion that they are bi-centric. See Michèle Finck, *Challenging the Subnational Dimension of Subsidiarity in EU Law*, 8 EUROPEAN JOURNAL OF EUROPEAN LEGAL STUDIES 5 (2015).

[10] It has, for instance, been argued that EU law is 'blind' towards SNAs. H. Ipsen, *Als Bundesstaat in der Gemeinschaft* in FESTSCHRIFT FUR WALTER HALLSTEIN ZU SEINEM 65. GEBURTSTAG 203, 248, 256 (Walter Hallstein, Ernst von Caemmerer, Hans Jürgen Schlochauer, Ernst Steindorff 1966).

The present essay argues that SNAs' influence is best measured not by the lack of formal competence to participate in supranational government but rather by the functional interconnections and interactions they entertain with the EU. The Treaties' definition of static jurisdictional lines between the Member States and the Union indeed reveals but one facet of the complex relations between various levels of public authority in the EU. In addition to this formal account, it will be shown, a much more complex and dynamic tale can be told that reveals that SNAs influence other scales not purely through political magnitude (for instance via their representative offices in Brussels or the Committee of the Regions) but also through the norms they create.[11]

This functional perspective on SNAs and their norms, informed by the comparative lens adopted, unveils that the supranational legal order is characterized by polycentricity[12] (it is made up of multiple centers of public authority, not just two) and porosity (the borders dividing these units are permeable rather than self-contained, allowing cross-fertilization to take place).[13] In this structure, SNAs play a vital part as they significantly shape EU law's substantive development through their frequent interaction with supranational law. My analysis highlights numerous occasions where the interaction between a subnational norm and a norm of EU law has changed supranational law's substantive core; for instance, where a subnational policy has developed the derogations regime under free movement law. Fragmentation, the existence and exercise of regulatory authority on various scales, does thus not inevitably lead to faction but can instead assist integration.[14] While fragmentation proves to be challenging at times, and can temporarily divide the polity, there is a parallel yet under-theorized account according to which fragmentation can yield integration. From this perspective, the EU's multi-level regime strengthens European integration (and the acceptance thereof at subnational level).[15]

The analysis leading to that conclusion is organized as follows. As the study of EU law in all its facets is outside of the scope of this short essay; the paper draws on a sample of CJEU judgments to highlight the intertwining of the subnational and the supranational and the ability of such interconnection to shape European legal integration. I will focus in particular on five dynamics identified by the 'federalism as the new nationalism' school to show that (i) SNAs can be exporters of norms; (ii) there is a process of ongoing negotiation between the local and the supranational; (iii) SNAs can be loyal dissenters in EU integration; and (iv) a system of checks and balances has emerged between the local

[11] For a study of the impact of SNAs' offices in Brussels, see Carlo Panara, *The Sub-National Dimension of the EU* (Springer 2015).

[12] For a definition of polycentricity, see Elinor Ostrom, *Polycentric Systems for Coping with Collective Action and Global Environmental Change* 20 GLOBAL ENVIRONMENTAL CHANGE 550, 550 (2010). The EU has recently started adopting this terminology itself, in the Pact of Amsterdam http://urbanagendaforthe.eu/wp-content/uploads/2016/05/Pact-of-Amsterdam_v7_WEB.pdf, 4.

[13] See further Michèle Finck, SUBNATIONAL AUTHORITIES IN EU LAW (forthcoming 2017). See also Heather K. Gerken, '*The Foreword: Federalism All the Way Down*' (2010) 124 HARV. L. REV. 4.

[14] For similar conclusions in the U.S. context, see Gerken, *supra* note 1, 7 and Cristina Rodriguez, *Negotiating Conflict Through Federalism*, 123 YALE L. J. 2094 (2014).

[15] Compare to Gerken, *supra* note 1, 1893 ('federalism can be a tool for improving national politics, strengthening a national polity, bettering national policymaking, entrenching national norms, consolidating national policies, and increasing national power. State power, then, is a means to achieving a well-functioning *national* democracy').

and the supranational. It will finally be argued that (v) while the Treaties devise a rights-based strategy to accommodate SNAs, looking beyond their formal letter reveals that such accommodation has in fact already occurred via institutional avenues. This will reinforce the conclusion that in the contemporary European legal order fragmentation assists rather than undermines the integrative process. The first factor leading to that conclusion is that subnational norms can be integrated into the body of supranational law.

A. Subnational Authorities as Importers and Exporters of Norms

Resnik revealed that in the US local governments are 'importers and exporters of law.'[16] While referring to the interaction between the local on the one hand, and the international and transnational on the other, her analysis highlights the interconnection between and porosity of jurisdictional borders, which can also be identified in the context I am concerned with. Regulatory import and export transpires vertically and horizontally between SNAs and their surrounding legal orders. Horizontal import and export occurs, for instance, by way of the innumerable transnational networks that have emerged between SNA that serve, for example, to exchange good practices and model legislation.[17] The vertical dimension consists in subnational norms influencing those of other scales, such as States and the EU.[18] According to Resnik, 'laws (like people) migrate, and seepage is everywhere', explaining why local norms can impact surrounding legal orders.[19] Subnational authorities function as importers of norms as they may incorporate international or transnational regulations. This has, for example, been observed when American municipalities incorporated the Convention on the Elimination of all Forms of Discrimination Against Women ('CEDAW') standards despite the federal level's continued reluctance to ratify the Convention.[20] SNAs' importing function in the EU is plain as they are key implementers of EU secondary legislation.[21] Local and regional authorities are, however, also exporters of norms. While this account is less acknowledged, SNAs as a matter of fact influence EU law through their norm-generating capacity. This is so as EU law frequently incorporates norms inspired by subnational regulation. Federalism, Gerken has argued,

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[16] Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L. J. 1564, 1576 (2006).

[17] This can for instance be observed in the context of climate change. See Harriet Bulkeley, Vanesa Castan Broto, Gareth Edwards, AN URBAN POLITICS OF CLIMATE CHANGE. EXPERIMENTATION AND THE GOVERNING OF SOCIO-TECHNICAL TRANSITIONS (2015).

[18] I argue this in the context of gay rights in *Michèle Finck, The Role of Localism in Constitutional Change: A Case Study* (2014) 30 J.L. & POL. 53.

[19] Resnik, supra note 16 at 1576.

[20] Stacy Lozner, '*Diffusion of Local Regulatory Innovations: The San Francisco CEDAW Ordinance and the New York City Human Rights Initiative'* 104 COLUMBIA. L. REV.768 (2004).

[21] See Pact of Amsterdam, *supra* note 11 at 3. The degree to which SNAs implement EU law varies depending on the Member State at stake, yet it is safe to assume that all States rely on the support of their SNAs to ensure compliance with EU law.

> envisions a system in which the decisions produced by minority rule do not stand separate and apart from the system, but feed back into national debates. It is one in which the energy of outliers serves as a catalyst for the center.[22]

Subnational norms' catalysing function in the European context can be observed on hand of the *Omega* case[23], in which the CJEU determined that the freedom to provide services, a cardinal pillar of market integration, can be restricted by a municipal measure seeking to protect public policy and human dignity.[24] Bonn had prohibited the operation of laser games, deeming them to involve 'playing at killing people'.[25] This was, however, a particular, localised interpretation of human dignity, not shared more widely in Germany or indeed other Member States.[26] While dignity is doubtlessly a core constitutional principle in German constitutional law, the interpretation thereof endorsed by the CJEU was purely local at the time. Whereas the *Länder* and the federal government considered the outlawing of the activity to be undesirable[27] the judiciary was divided on the issue.[28] In this context, Bonn operated a deeply normative assessment in applying a higher standard of protection than it had to as matter of national constitutional law. The CJEU not only tolerated that interpretation, but also accepted that human dignity amounts to a general principle of EU law.[29] In accepting this specific localised interpretation of dignity, it effectively imported Bonn's interpretation of human dignity into EU law. The city's declaration of human dignity's heightened importance – of course indirectly and through a chain of events – led to the recognition of the general principle.[30] Subtle as it may be, the relation between the local claim and the EU general principle points towards the intertwining of the European and local legal orders. It shows that they are porous rather than self-contained, allowing normative cross-fertilizations to occur. The adjudicative process triggered by Bonn's intervention led to a higher status of human dignity in EU law, which all actors in the EU could henceforth rely on. It is in this sense that SNAs have the capacity to influence EU law's substantive development.

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[22] Gerken, *supra* note 3, 48.

[23] Case C-36⁄02 *Omega Spielhallen-und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundeststadt Bonn* [2004] EU:C:2004:614.

[24] This principle is enshrined in Article 56 TFEU. *Omega*, *supra* note 21, paras 24-28.

[25] *Omega*, *supra* note 21, paras 6-7 and 32.

[26] Localized interpretations have also shaped the jurisprudence of the U.S. Supreme Court, such as the notion of obscenity. See Miller v. California 413 U.S. 15.

[27] Der Spiegel 13/1994 'Ewiger Streit' (1994), 93-95, http://www.spiegel.de/spiegel/print/d-13686882.html.

[28] OVG Rheinland-Pfalz, Beschluss vom 21.06.1994, Az.: 11 B 11428/94, NVwZ-RR 1995, 30; OVG NRW Beschluss vom 28.06.1995, Az.: 5 B 3187/94, Gew Arch 1995, 470; OVG NRW, Beschluss vom 17.12.1999, Az.: 5 A 4915/98, NVwZ 2000, 1069. Compare to this: Bay VGH, Beschluss vom 04.07.1994, Az.: 22 CS 94.1528 NVwZ-RR 1995, 32 (1994).

[29] *Omega*, *supra* note 21 para 34. The Court had already affirmed in Case C-377/98 *Netherlands v. Parliament and Council* [2001] ECR I-7079 that it is for the Court 'to ensure that the fundamental right to human dignity and integrity is observed.' This case, however, concerned EU secondary law which itself protected human dignity, and there is no recognition of dignity as a general principle.

[30] For an overview of general principles in EU law, see TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EU LAW (Oxford University Press, Second Edition, 2006).

Cities, such as Bonn, have no formal competence to influence EU law, yet through the interactions of their own norms and those of the Union they have the capacity to influence supranational law's substantive core. What is striking about *Omega* and the other rulings subject to analysis here is that the CJEU treats subnational measures in the same manner as it treats those of the Member States. This technique allows municipal norms to have identical generative effects in EU law that Member State norms are known to have.[31] Despite the Treaties' focus on drawing formal dividing lines between the national and the supranational, a functional analysis reveals that these scales, but also the subnational, are profoundly intertwined. Resnik's verdict that 'the actual autonomy – of states to each other, to the nation, or of the nation to the world – is vastly overstated' equally applies to the polycentric European Union.[32] This becomes even more salient if we consider that express judicial engagements are not the only manner through which norms are absorbed into EU law.[33] The interconnection between the subnational and supranational is, in addition, confirmed by the existence of a framework of constant negotiation between domestic authorities and the Union.

B) European Integration As A Framework For Negotiation

Rodríguez perceives the value of federalism in the 'framework it creates for the ongoing negotiation of disagreements large and small.'[34] It is in this sense that it constitutes a 'framework of national integration'.[35] Polycentric structures allow various actors, including localities, to communicate and mediate (dis)agreements, as a consequence of which they coexist more harmoniously in a context characterized by both independence and interconnection. These negotiations can occur inside and outside of the courtroom. Crucially, for my purposes, this process includes SNAs. Rodríguez has documented these dynamics in the context of US immigration policy. She emphasised that despite the fact that immigration policy is formally the exclusive domain of the federal government, federal-local relations have given rise to 'an integrated system to manage contemporary immigration.'[36]

While the formal surface depicts the American system as bi-centric and static, it is in reality polycentric and dynamic. The European legal order can similarly be captured as a polycentric framework of on-going negotiation between multiple actors; also SNAs, which knit together the polycentric polity. Coming back to *Omega*, it might be said that in issuing the ban, Bonn openly disagreed with a conception of the free movement of services the economic aim of which trumps concerns for human dignity. Ongoing negotiations between SNAs and the supranational level, however, occur much more widely; for instance, through the political negotiations conducted by SNAs' innumerable

[31] Article 6(3) TEU makes this explicit in the context of fundamental rights.
[32] Resnik, *supra* note 16, 1579.
[33] This can also occur through other channels, for instance when judges engage with such materials without citing them.
[34] Cristína M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L. J. 2094 (2014).
[35] *Id*. at. 2097.
[36] Cristína M. Rodríguez, *The Significance of the Local in Immigration Control*, 106 MICHIGAN L. REV. 567, 567 (2008).

representative offices in Brussels.[37] From a legal perspective, the concept of 'derogations' in free movement law is more pertinent. Derogations, which have thus far only been studied from a Member State-EU angle, refer to the fact that if the objective pursued by a domestic measure is justified and it is necessary and proportionate, EU law allows public authorities to digress from the economic objective.

Numerous cases confirm that just as Member States, SNAs are sites of negotiation where the substantive core of this particular area of EU law is being worked out. In *Aragonesa*, Catalonia negotiated its own understanding of the free movement of alcoholic goods with the European level.[38] A dispute had arisen between a company operating advertising hoardings and the Spanish Autonomous Community. Catalonia had imposed administrative fines on the company for infringing a Catalan law that prohibited the advertisement of strong alcoholic beverages in the media, streets, highways, cinemas and on public transport.[39] The company put forward that the regional legislation was in breach of Article 34 TFEU as it limited marketing opportunities for drinks from other Member States. In *Aragonesa*, the CJEU accepted Catalonia's justification for breaching its free movement obligation. It first clarified that Article 34 TFEU applies to measures of any origin, 'be they the central authorities, the authorities of a federal State, or other territorial authorities.'[40] Subnational measures are thus recognized to have the same detrimental effects on EU law as those of the Member States.[41] As a corollary, subnational measures can equally be justified as those of the States, for instance, if they pursue public health objectives, as in the case at issue.[42] The recognition of derogations importantly has consequences beyond the particular dispute as after the recognition of a ground of derogation, other actors can rely on it. This illustrates that in judicial settings SNAs have the same capacity to negotiate the contours of the EU's economic freedoms as the Member States, despite the lack of any formal corresponding competence.

This dynamic is illustrated by countless other cases, only one of which can be mentioned here: *Walloon Waste*.[43] In this landmark decision, the Court decided that a ban on importing waste imposed by Wallonia could be justified for general, but not hazardous waste.[44] While this holding has been subject to controversy from an environmental perspective, it ultimately developed the economic freedoms regime under EU law in recognizing that the free movement of goods imperative could be limited where environmental objectives are at stake.[45] This development in EU economic law was spurred by a subnational measure objecting to the unqualified free flow of trade within the internal market. This instance again illustrates that fragmentation amplifies dialogue and eventually knits together the polity as it leads to outcomes more acceptable to all.

[37] For an overview, see Panara *supra* note 9.
[38] Case-1/90 *Aragonesa* (1991) EU:C:1991:327.
[39] Para 3.
[40] Para 8.
[41] Paras 8, 11 and 23-4.
[42] Paras 16-18.
[43] Case 2/90 *Walloon Waste* [1992] EU:C:1992:310.
[44] The justification being that there was EU secondary legislation on the cross-border shipment of hazardous waste.
[45] Para 32.

Indeed, because subnational authorities play a crucial role in the implementation of the free movement regime, dissenters are turned into decision makers.[46] SNAs' lack of formal competences does not preclude these dynamics from occurring.

If we acknowledge that the institutional net encompassing normative negotiations in the EU system reaches wider than just the States, SNAs emerge as insiders of European legal integration. It is certainly accurate that EU integration has in many contexts reduced subnational competences as a consequence of which they sometimes no longer have the same influence on a domestic scale as they did prior to European integration. This is not, however, a one-dimensional phenomenon as European integration has further opened new avenues for SNAs to exert influence. Through their own policies, local and regional actors can trigger judicial and extrajudicial conversations with other levels of governance, including the EU, and sometimes convince them to adopt the local policy. The subsequent section outlines an additional and related manner in which SNAs can contribute to EU legal integration: in dissenting loyally.

C) SNAs Have Opportunities for Loyal Dissent

Derogating from the free movement obligations can not only be fathomed as a process of ongoing negotiation but also as a variant of loyal dissent, another characterizing feature of federalism as the new nationalism. Gerken illustrated that the US 'offers a 'form of loyal opposition' – federalism.[47] This multi-level system 'dramatically expands the sites of resistance and the leverage points for change'.[48] Not only the 'highest' level can steer the course of policy change, but so can other actors. When SNAs dissent to policies taken at 'higher' levels, they can do so in ways different from most other actors. Rather than simply voicing concerns, as individuals or non-governmental organizations can also do they have the option to manifest opposition through legally binding measures.[49] The fragmentation of public authority and the reliance of the EU on SNAs for the implementation of EU law, indeed, turn these dissenters into 'decision makers, not just lobbyists of supplicants'.[50] Two distinct avenues are available to SNAs in this respect. Local and regional authorities can first dissent in adapting the manner in which they implement EU law[51]; and second, adopt their own policies to contrast those at supranational level. This section examines the consequences and impact of the second option and pinpoints that through their regulatory function, SNAs are in a position to shape supranational policies they disagree with. The supranational scale regularly incorporates such norms, which the 'federalism as the new nationalism' school would

[46] ibid 1903 ('[b]ecause states and localities play a crucial role in administering federal law, federalism turns dissenters into decisionmakers, not just lobbyists or supplicants'.)

[47] Gerken, *The Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 60 (2010). For a more developed account of the notion of loyal opposition, see Heather Gerken, *The Loyal Opposition*, 123 YALE L. J. 1958 (2014).

[48] Gerken, note *supra* 47 at 1980.

[49] In addition to their intervention in the legislative process, which is more than limited for SNAs in the EU.

[50] Gerken, *supra* note 1, 1903.

[51] For an analogy in the U.S. see Gerken, note *supra* 47 at 1981 ('[b]ecause states and localities play a crucial role in administering federal law, federalism turns dissenters into decision-makers, not just lobbyists or supplicants').

interpret as 'a gesture of loyalty toward the opposition whose loyalty we in turn demand.'[52]

EU law enables SNAs to engage in loyal opposition, a variant of dissent that is not understood as engaging a tug-of-war over a given topic but rather a discussion amongst partners that display opposing positions. *Digibet* illustrates that point. The case concerned gambling, a sensitive area not harmonized due to widely diverging approaches among Member States.[53] States accordingly retain considerable regulatory autonomy[54], which falls to the *Länder* in Germany.[55] Here, the sixteen *Länder* generally regulate in common through a Treaty, yet in 2012 Schleswig-Holstein decided not to participate in that regime, operating its own, more permissive scheme, before finally opting into the Treaty in 2013. Litigation arose in the context of which domestic courts had to assess whether the fragmented nature of the restrictions impacted their compatibility with EU law. Under Union law, gambling restrictions must be justified by public interest objectives and the referring court enquired whether such an interest exists if one *Land* enacts more permissive legislation.[56] The key question was thus whether a public interest needed to be perceived homogenously throughout the national territory for it to be legitimate under EU law. Formulated differently, the Court had to determine whether EU law tolerates regulatory fragmentation *within* a Member State just as it tolerates fragmentation *between* States. Answering this question in the negative would have entailed that only States and not SNAs can regulate games of chance as a matter of EU law, effectively rendering void existing subnational competences.

The CJEU concluded that SNAs have the same opportunity to engage in loyal dissent as States. Recognizing that the Treaty restricted the freedom to provide services under Article 56 TFEU, it found the measure to be justified on the basis of the public interest criterion.[57] It referred to the 'particular nature of the gambling sector' where the presence of harsh competition might increase expenditure on gaming and the risk of addiction.[58] The Court also recalled that Member States are free to organize themselves internally as they see fit.[59] It follows that SNAs have the same opportunity to limit the freedom to provide services principle as the Member State have, and this even where their regulation warrants a non-homogenous application of the public interest criterion in a single State. While SNAs do not formally participate in the EU legislative process, they can dissent to supranational norms through their own regulatory schemes.[60] If EU law recognizes their dissent, other actors can also rely on it, confirming that local and regional authorities

[52] Gerken, note *supra* 47 at 1960.
[53] Case C-156/13 *Digibet* [2014] EU:C:2014:1756.
[54] Para 24.
[55] Articles 70 and 72 of the German Basic Law.
[56] Para 23.
[57] Para 22.
[58] Para 31.
[59] Para 33 ('the question of how the exercise of such powers and the fulfillment of such obligations may be entrusted by Member States to specific national bodies is solely a matter for the constitutional system of each State').
[60] The Committee of the Regions sometimes intervenes in the EU legislative process. It, however, does not represent all SNAs, and SNAs act collectively rather than individually in this context.

contribute to EU law's substantive development. While space has only allowed for the discussion of *Digibet*, numerous other cases make the same point.[61]

The remaining interrogation is why such dissent should be qualified as 'loyal' in character. When dissenting, SNAs need to take into account not merely their own interests but also those of the EU. While they are at liberty to dissent, their opposition must remain respectful of certain boundaries so as to not become disloyal to the supranational interest. Even in *Digibet*, the Court indicated that had Schleswig-Holstein's diverging regime been more extended in time or scope, its compatibility with EU law might have been at risk.[62] In *Scotch Whisky*, the CJEU concluded that the boundaries of loyalty had been exceeded.[63] The case concerned the compatibility between planned Scottish legislation aimed at reducing alcohol consumption and the free movement of goods. Scotland intended to inaugurate a system of minimum pricing per unit of alcohol in order protect 'human life and health' under Article 36 TFEU in reducing the consumption of alcohol. Observing that the measure was caught by Article 34 TFEU, the Court concluded that it nonetheless fell short of being capable of justification as it could hinder market access of foreign producers the competitive advantage of which consisted in low pricing.[64] While the Court held that a minimum pricing strategy was, as a general matter, an appropriate means to further the targeted objective, the one at issue went further than necessary as the objectives could have been advanced by measures less restrictive of trade, suggesting fiscal strategies as an alternative.[65] EU law, hence, requires SNAs, just as Member States, to be mindful of supranational concerns when dissenting through independent regulation. The Luxembourg court, indeed, established in *Fratelli Costanzo* that local and regional authorities have an obligation of loyalty towards the EU.[66] This is striking as Article 4(3) TEU, which governs the principle of loyal cooperation in EU law (a corollary of federal comity) refers solely to the EU and the Member States, not SNAs.[67]

[61] See, by way of example, Case C-428/07 *Horvath* [2009] EU:C:2009:458, Joined Cases C-544/03 and C-545/03 *Mobistar and Belgacom Mobile* [2005] EU:C:2005:518, Case C-88/03 *Portugal v Commission* [2006] EU:C:2006:511.

[62] Para 39. This is a somewhat surprising statement and it should be noted that there has, to my knowledge, never been a case where the Court found a subnational measure to not be justified in EU law because the differentiated interpretation of the public interest criterion it embodies was more extended in time and space.

[63] Case C-333/14 *Scotch Whisky* [2015] EU:C:2015:845.

[64] Para 46.

[65] Paras 39-41. This holding ignores that under the current devolution agreement Scotland does not in fact have any tax powers in this context. Such ignorance should not, however, be seen as a treatment of SNAs that diverges from that of Member States as the Court similarly does not enquire whether the State has such a competence or whether it has been devolved to an SNA.

[66] Case C-103/88 *Fratelli Costanzo* [1989] EU:C:1989:256. See, in particular, the opinion of Advocate General Lenz at para 29.

[67] For an overview of the principle, see Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014). and Geert De Baere and Timothy Roes, 'EU Loyalty as Good Faith' (2015) 64 International and Comparative Law Quarterly 829.

Overlap generates interdependence and integration – precisely because institutions 'depend on one another to get anything done'.[68] SNAs must be loyal to the EU and its objectives when formulating their independent policies, yet EU law is also loyal to them as it takes their requests for derogation just as seriously as the States'. The EU in turn relies on SNAs' loyalty as crucial implementers and executers of EU law. Gerken identified that federalism 'gives those in power an opportunity to affirm their loyalty to those whose loyalty they in turn demand.'[69] It can be presumed that States, just as SNAs, are more willing to abide by supranational objectives if their specific concerns are accounted for. In showing loyalty to SNAs and their concerns, EU law secures their loyalty in turn. While it is accurate that attempts to derogate from European law showcase an uncooperative aspect of SNAs' relation to the EU, the fact that the supranational level accounts for these concerns and, provided that the necessary safeguards of legitimacy, necessity and proportionality are met, incorporates them into the body of supranational law highlights the cooperative nature of inter-level relations in the EU. The judicial body of EU free movement law is accordingly being constructed through polycentric communication and dialogue concerning the desirable contours of free trade and its relation and impact on other policy objectives. It is worth stressing that loyalty and integration can be furthered precisely because SNAs and the EU usually support both the economic freedom *and* the ground of derogation relied on. The disputes covered here, indeed, solely relate to their respective boundaries.

Dissent can even be understood as an intrinsic feature of multi-level structures in which one actor depends on the cooperation of another for the success of its own policies. Bulman-Pozen considers that a system that embraces delegation also enshrines an 'acceptance of the divergences it generates.'[70] This is so because:

> the very existence of state regulatory authority, as well as the concurrent nature of much of federal and state authority, means state and local lawmaking will challenge federal positions, requiring the federal government to react. [71]

Cooperation between these various scales of public power is vital for the 'knitting together' of the EU. Division and discord can accordingly be 'useful components of an integrated policymaking regime and a unified [national] polity.'[72] The Union itself carries only a minor administrative base so that the implementation of EU law is a duty for the Member States, which they often delegate to SNAs. The fact that in exercising these competences local and regional authorities shape not only their own system but also that of the EU which underlines that they are not the passive agents the Treaties make them out to be.[73] The subsequent section exhibits that SNAs further have a function in the EU's polycentric apparatus of checks and balances.

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[68] Gerken, note *supra* 47 at 34.
[69] Gerken, *supra* note 1, 1982.
[70] Jessica Bulman-Pozen, 'From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism' (2014) 123 YALE L.J. 1626, 2109.
[71] Id. at. 2111.
[72] Gerken, *supra* note 47, 10.
[73] Heather Gerken, *supra* note 1, 1893.

D) A System of Checks and Balances

This paper has thus far outlined that SNAs and their norms influence European legal integration in the context of their frequent interactions. In the polycentric supranational legal order, norms travel between the increasingly porous boundaries separating the supranational and the subnational. After having surveyed the relation between these respective norms, this section will reflect on the relation between levels of public authority as such. The doctrine of 'federalism as the new nationalism' provides an equally helpful lens for that endeavor. Gerken distinguished two separate paradigms that can be relied on to capture the relation between levels of public authority; separation of powers and checks and balances:

> separation of powers, depends on autonomy and independence. Power is diffused by ensuring that institutional actors swim in their own lanes, carrying out their own programs within their own independent spheres. The second model, checks and balances, depends not on separation and independence, but on integration and interdependence. Power is diffused by creating a messy structure of overlapping institutions that depend on one another to get anything done.[74]

The Treaties organize EU-Member State interactions alongside a 'separation of powers' paradigm. Public authority belongs *either* to the EU *or* to the Member States as specific rules govern the division of regulatory competence between them and no mention is made of local and regional authorities. Article 3 TFEU lists the EU's exclusive competences, Article 4 TFEU enumerates the areas where competence is shared between them, and Article 5 TFEU engages with the so-called 'supporting' competences. Crucially, even where an issue does not pertain to the EU's exclusive competence, this does not indicate that it is jointly regulated by Member State and EU action. Rather, the principle of subsidiarity will determine which level regulates in the given instance. This principle is embodied in Article 5(3) TEU, which reads:

> Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level *or at regional and local level*, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.[75]

According to the subsidiarity test public authority is exercised either by the Member States or the EU. As I have illustrated elsewhere, the relatively novel reference to the regional and local levels in Article 5(3) TEU is incapable of altering that conclusion.[76] The provision does not enquire whether, in areas not falling within the EU's exclusive competence, (i) the EU, (ii) the Member States, or (iii) local and regional governments should act. Article 5(3) TEU does not establish a three-part, but rather a two-part test, asking whether (i) the EU, or (ii) the Member States, at central, regional or local level,

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[74] *Id*. at. 34.
[75] My own emphasis.
[76] Michèle Finck, *Challenging the Subnational Dimension of Subsidiarity in EU Law* (2015) 8 European Journal of Legal Studies 5.

should regulate. The decision whether the central, local or regional level intervenes is an exclusively domestic affair, distanced from the EU itself. Article 5(3) TEU can accordingly not alter the conclusion that the Treaties are bi-centric and that no competence falls to subnational authorities. The formal rules on the division of competence in Articles 3-5 TFEU and the principle of subsidiarity accordingly confirm that EU primary law is structured alongside a 'separation of powers' paradigm that seeks to devise separating lines between the two sets of actors – making sure they each swim in their own lanes with no space for SNAs.

A functional account of EU law provides different insights. The cases examined above underline that various levels of public authority functionally interrelate as they regulate in parallel, and in manners that cannot necessarily be grasped through the separation of powers prism. In *Aragonesa*, Catalonia sought to enhance public health, and in doing so impacted on the internal market. In *Omega*, Bonn sought to protect human dignity and public order and equally reshaped the internal market. In *Walloon Waste*, Wallonia attempted to protect the environment and indirectly developed the EU fundamental freedoms regime. Despite the evident porosity of the various jurisdictional borders, Article 4 TFEU envisages only Member States' and the Union's impact on the internal market. The coexistence of regulation relevant for the internal market at supranational, national and subnational scales hints at the complex web of overlapping and intertwining regulatory schemes in the EU. It also indicates that in the polycentric and porous European legal order connection determines an actor's influence rather than formal competence and autonomy. Under the Treaties, SNAs have none of the latter, yet they can, as illustrated above, influence EU law's substantive development as their interconnection allows them, for instance, to export their norms and negotiate EU law's normative core. From a functional perspective, EU law thus very much resembles the 'messy structure' that Gerken alludes to as opposed to the autonomy and independence that comes with the separation of powers model. Here, overlap generates interdependence and integration – a step-by-step process between many actors to work out the precise contours of policy objectives and their mutual relation, actions which result in the 'knitting together' of the European polity.

In the context of these interactions, checks and balances play out in a number of ways. The subnational measures above act as a check on EU action as they prevent that supranational economic objectives unduly impact on other concerns, such as environmental preservation and public health. This check, however, has its counterpart in the CJEU's control of the local measure. The Court, indeed, does not blindly accept arguments in favor of derogation but rather verifies whether the objective pursued is legitimate and in activating the proportionality test. In these contexts, subnational norms are treated in the same manner as Member State norms. Similarly, their respective impact on EU law can be equated. These findings underscore SNAs' active role in European integration as they check on EU action and are checked on by the EU in a manner analogous to the Member States. These mutual verifications generate close interactions between the supranational and the subnational that are not proposed by the Treaties. This again underscores that the EU and SNAs are functionally interconnected even if they are presumed to stand separate under formal accounts. This separation and interconnection divide has also been pinpointed by the 'federalism as the new nationalism' school

through the development of a dichotomy between 'rights-based' and 'institutional' participation. This is the focus of the subsequent section.

E) An Institutional Rather Than Rights-Based Integration

Gerken diagnosed a divide between rights-based and institutional avenues of participation in multi-level systems. While this aspect of her research is concerned with the status of minorities, rather than localities, the spectrum's applications to the status of SNAs in EU law provides intriguing insights. Gerken highlighted that albeit not obvious at first, the American system offers those that do not have formal rights to participate in government a strategy of institutionalized opposition: federalism.[77] I will first introduce the rights-based model and outline its application to SNAs in EU law and subsequently move to the paradigm of institutional integration.

The rights-based model is 'built on the notion that the best way to protect minorities is to give them an exit option - the chance to make policy in accord with their own preferences, separate and apart from the center'.[78] Article 5(3) TEU seeks to establish a rights-based strategy to accommodate SNAs in the EU. The reference to the local and regional levels, which dates back only to 2009, has been interpreted as an attempt to protect SNAs' competences from undue supranational interference, determining specific circumstances in which EU integration cannot penetrate to the subnational scale.[79] This can be interpreted as an effort in separating, rather than integrating the various component parts of the polycentric EU. Article 5(3) TEU attempts to delimit a safe-haven for SNAs where they are shielded from supranational interference. Pursuant to this narrative, SNAs deserve a formal sphere of protection from EU integration.[80] This is reminiscent of narratives of sovereignty and separate spheres and their impact on our thinking about public power. SNAs, considered to be the weaker elements of the overall system, receive explicit protection through a specific right – that to regulate without interference where 'by reason of the scale or effects of the proposed action' it can be better achieved at Union level.[81] The rationale also resembles the sovereignty paradigm as it seeks to determine the actor that, in a complex system of layered authority, 'gets to play the trump card when the center and periphery tussle.'[82]

In practice, subsidiarity fails to provide any meaningful recognition of SNAs in EU law.[83] This does not, however, mean that SNAs are propelled outside of the process of EU integration. Rather, just as Gerken has shown to be the case for minorities in the US, local and regional authorities *already* have voice in the EU – a voice secured by

[77] Gerken, note *supra* 1 at 1959.
[78] Gerken, *supra* note 47, 7.
[79] For an overview, see Claudio Mandrino, *The Treaty of Lisbon and the New Powers of Regions* 10 EUROPEAN JOURNAL OF LEGAL REFORM 515 (2008).
[80] Gerken, *supra* note 47, 34 (noting that 'many assume that minorities need sovereignty - a shield against federal interference - for minority rule to represent a useful check').
[81] Article 5 (3) TEU.
[82] Gerken, *supra* note 47, 35.
[83] Finck *supra* note 76.

institutional as opposed to rights-based mechanisms.[84] Institutional participation here refers to the possibility for local and regional authorities to participate through the existing arrangements, despite being devoid of any formal rights to participation. In trying to graph the mutual relations between various actors in a polycentric structure connection matters, not just formal competences. The cases examined above confirm that SNAs are part of the polycentric EU institutional structure that engage in a direct dialogue with EU law, and in doing so, forge its substance. This however only becomes apparent if we look through a functional, not purely formal, lens. In *Omega*, Bonn's policy affected the EU free movement regime just as the Catalan measure in *Aragonesa*, the Walloon ban in *Walloon Waste*, and Schleswig Holstein's derogation in *Digibet*. Whereas local and regional authorities have not received any meaningful formal rights to participation through the 2009 amendment of Article 5(3) TEU, they *already* influence the core of EU substantive law under existing arrangements. It is for this reason that this essay refers to the EU as a polycentric structure despite the fact that the Treaties treat it as a bi-centric Union.

This confirms that any assumption that an active involvement of SNAs inevitably leads to fragmentation is misguided. As Bulman-Pozen recognized, 'integration yields integration, not separation.'[85] The very fact that SNAs are institutionally integrated allows them to influence EU legal integration. In polycentric systems, actors can indeed 'rule without sovereignty'.[86] Even if SNAs have no formal rights analogous to the Member States, the rights-based mechanism crafts special avenues for SNAs to influence EU law's substantive development.[87] An often-cited reason underlying the reluctance to divide power between many actors is the fear of faction.[88] The risk of having multiple hubs of public authority, it is often assumed, is fragmentation and chaos – the opposite of integration. It is tempting to assume that the involvement of SNAs in EU affairs bears the risk of bringing too many parties to the table, hindering integration. Rather than enhancing the success of the polity, these dynamics would weaken it. Theories of federalism as the new nationalism, however, convincingly underline that this is no foregone conclusion as decentralized decision-making can strengthen the polity. The same conclusion appears to be valid on the other side of the Ocean.

Conclusion

This paper has shown that SNAs can be active participants in EU legal integration as they are exporters of norms; there is a process of ongoing negotiation between the local and the supranational, SNAs can be loyal dissenters in EU integration, and a system of checks and balances has emerged between the local and the supranational. It has also been seen that while the surface of EU law devises a rights-based strategy to accommodate SNAs, a look below its surface reveals that such accommodation has already occurred via institutional means.

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[84] Gerken, *supra* note 1, 1958-59.

[85] Bulman-Pozen *supra* note 69, 1922.

[86] Gerken *supra*, note 47, 8.

[87] Gerken, *supra* note 47, 8 (if we recast federalism 'as minority rule *without* sovereignty would push federalism all the way down').

[88] See James Madison, *Federalist No 10*, in THE FEDERALIST (Henry B. Dawson, ed. 1863).

These conclusions reveal that our understanding of the substantive development of EU law is contingent on our imagination of its structure. If we adopt a formal perspective, in line with the European Treaties, EU law's substantive development appears to be but the product of the exclusive interaction of the EU and the Member States. If we, however, acknowledge that, from a functional perspective, apparent only if we look beyond the Treaties, the EU's institutional structure is polycentric, we perceive that EU legal integration is itself a polycentric process, involving multiple actors. This conclusion also underscores that the influence levels of government have in polycentric systems is best measured by their interconnections rather than autonomies. Indeed, in the EU just as in the US, subnational authorities have shown that they are in a position to 'rule without sovereignty'.

EU primary law operates abstractions of inter-institutional and substantive interactions that are much more schematic than the reality that underlies them. This is not necessarily a bad thing. It is often the very purpose, or at least result, of the law to operate abstractions. While abstractions may be necessary to understand and operate EU law, letting go of them is helpful to come to terms with the role and status of SNAs in EU law. This exercise has, indeed, allowed us to perceive that, despite being devoid of sovereignty and not formally recognized by the Treaties, local and regional authorities assist supranational legal integration. In this parallel account to formalism, '[t]he key is not to figure out who wins, but to understand how the center and periphery interact and to maintain the conditions in which they can productively cooperate, conflict, and compete.'[89]

[89] Gerken, *supra* note 47, 37.